Achieva Technology Sdn Bhd v Lam Yen Ling & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D2–22–447 OF 2005
MARY LIM JC
19 MAY 2009

Civil Procedure — Contempt of court — Order of committal, application for — Whether there was intention to intimidate witness and intention to interfere with administration of justice — Whether proof beyond reasonable doubt required — Whether there was multiplicity of action based on same facts and issues — Rules of the High Court 1980 O 52

The plaintiff's company in this case had instituted an action against the 17 defendants for loss and damage occasioned by reason of alleged fraud and/or breaches of trust, fiduciary duties and/or terms of contract. Thereafter, the plaintiff had applied for an ex parte mareva injunction which was ordered to be heard inter partes. The plaintiff's application for the mareva injunction included an affidavit affirmed by one Yeong Sin Pui ('Yeong'). In this affidavit Yeong, inter alia, deposed the contents of a telephone conversation between the first and seventh defendants which he had overheard. Upon being served a copy of this affidavit, Siau Suen Min, the solicitor acting for the first and seventh defendants ('Siau'), issued a notice by way of a letter ('the notice') to Yeong for alleged defamatory/libelous statements made by Yeong against the first and seventh defendants. This notice demanded, inter alia, a complete withdrawal and apologies, the sum of RM40,000 as damages and threatened legal action in the event the reparation sought was not forthcoming. In response, the plaintiff wrote to the defendants informing them that the notice to Yeong was viewed as an 'interference with and/or intimidation of witnesses in the proceedings' and warned the defendants that an injunction would be sought to restrain the defendants. A separate letter, which was in essence the same as that which was sent to the defendants, was sent to Siau asking him to withdraw the notice to Yeong failing which a police report and a complaint with the Bar Council would be lodged. Thereafter, the plaintiff initiated an application restraining all the defendants except the ninth from taking any action which may have the effect of interfering with the administration of justice. This application was allowed with modifications. At the same time the plaintiff sought to lodge a written complaint with the disciplinary board against Siau but the board dismissed the complaint on the basis of no merit. An appeal against that decision to the High Court was also dismissed. The plaintiff then filed the present motion pursuant to O 52 of the Rules of the High Court 1980 seeking an order of committal against the first and seventh

defendants and Siau by reason of these three prospective contemnors having committed contempt of court by the issue of a notice to Yeong with the intention of intimidating Yeong and thereby intentionally or effectively interfering with the administration of justice. The plaintiff submitted that this motion was necessary and of utmost importance to the protection of witnesses generally including Yeong for otherwise the streams of justice would be polluted by such conduct. It was the plaintiff's submission that since the notice to Yeong was issued by an advocate and solicitor it exacerbated the seriousness or gravity of the threat or intimidation. In determining whether the three prospective contemnors had committed contempt of court it was necessary to consider whether the notice issued to Yeong was issued by the contemnors with the genuine intention of suing for defamation or merely as an empty threat to intimidate Yeong and pervert the course of justice.

Held, dismissing the motion with costs:

(1) Although the first and seventh defendants and their counsel, Siau, chose to issue a letter of demand ('notice') consistent with the exercise of a legal right of action in defamation, this right did not exist in law as the testimony of the witness, Yeong, was protected in law except where there was perjury. However, the chronology of events and the issue of the notice reflected a genuine intention to sue for defamation and therefore the notice was not issued as a mere threat for the purpose of intimidating Yeong as alleged (see para 32).

(2) The issue of the notice to Yeong by Siau, on behalf of the first and seventh defendants, was more of an error in judgment and legal opinion. Errors of judgment or misapprehension of the correct legal position do not fall within the meaning of criminal contempt. As such there was no mala fides at the material time or any guilty mind operating to defeat, obstruct or interfere with the administration of justice (see para 33).

(3) As the offence of contempt is a quasi-criminal offence the burden of proof is beyond reasonable doubt. However, from the facts of the case there was no proof of the notice being issued with the intention of intimidating Yeong or interfering with the administration of justice to find it 'absolutely necessary' to warrant an order of committal for contempt on the grounds filed in support of this motion (see paras 35–36).

(4) In any event the complaint had already been dealt with and it would not be just to subject the proposed contemnors to this additional action. Moreover an order of injunction based on the same facts and against the same persons was granted and a complaint against Siau to

A the disciplinary board had already been dismissed by the board and by the High Court. In the circumstances these actions, which were based on the same facts and in respect of the same issue ie interference with the administration of justice, ought not to be allowed (see para 37).

B **[Bahasa Malaysia summary**

Syarikat plaintif dalam kes ini memulakan tindakan terhadap 17 defendan-defendan bagi kerugian dan ganti rugi yang disebabkan oleh
C tuduhan fraud dan/atau pecah amanah, kewajipan fidusiari dan/atau terma-terma kontrak. Selepas itu plaintif memohon injunksi mareva ex parte yang diarahkan untuk didengar secara inter partes. Permohonan plaintif untuk injunksi mareva termasuk satu afidavit yang diikrarkan oleh Yeong Sin Pui ('Yeong'). Dalam afidavitnya Yeong memberikan keterangan bersumpah
D mengenai isi perbualan telefon di antara defendan pertama dan ketujuh yang telah didengarinya. Selepas sesalinan afidavit ini diserahkan, Siau Suen Min, peguamcara yang bertindak bagi pihak defendan pertama dan ketujuh ('Siau'), mengeluarkan satu notis melalui surat ('notis') kepada Yeong mengenai pernyataan fitnah/fitnah bertulis yang dibuat oleh Yeong terhadap
E defendan pertama dan ketujuh. Notis ini menuntut penarikan balik dan permohonan maaf, sejumlah RM40,000 sebagai ganti rugi dan ugutan tindakan undang-undang sekiranya pampasan yang dipohon tidak diberikan. Sebagai balasan plaintif menulis kepada defendan-defendan memaklumkan kepada mereka bahawa notis kepada Yeong dianggap sebagai satu
F 'interference with and/or intimidation of witnesses in the proceedings' dan memberi amaran kepada defendan-defendan bahawa satu injunksi akan dipohon bagi menghalang defendan-defendan. Sepucuk surat yang lain, yang sama isi kandungannya dihantar kepada defendan-defendan, dihantar kepada Siau meminta dia menarik balik notis kepada Yeong dan sekiranya dia gagal
G berbuat demikian satu laporan polis dan aduan kepada Badan Peguam akan dibuat. Selepas itu plaintif memulakan permohonan menghalang kesemua defendan kecuali defendan yang kesembilan daripada mengambil tindakan yang boleh mengganggu pelaksanaan keadilan. Permohonan ini dibenarkan dengan pengubahsuaian. Pada masa yang sama plaintif membuat aduan
H bertulis kepada lembaga disiplin terhadap Siau tetapi lembaga disiplin menolak aduan tersebut atas dasar tiada merit. Satu rayuan terhadap keputusan tersebut kepada Mahkamah Tinggi juga ditolak. Plaintif kemudiannya memfailkan usul ini menurut A 52 Kaedah–Kaedah Mahkamah Tinggi 1980 memohon satu perintah komital terhadap defendan
I pertama dan ketujuh dan Siau kerana ketiga-tiga penghina prospektif tersebut telah menghina mahkamah dengan mengeluarkan notis kepada Yeong dengan tujuan menakutkan Yeong dan secara sengaja atau efektif mengganggu pelaksanaan keadilan. Plaintif menghujah bahawa usul ini perlu dan amat penting untuk perlindungan saksi-saksi secara umumnya termasuk

Yeong kerana jika tidak perjalanan keadilan akan dicemari oleh tindakan tersebut. Plaintif menghujah bahawa sejak notis kepada Yeong dikeluarkan oleh seorang peguamcara dan peguambela ia menambahkan keseriusan atau graviti ancaman atau intimidasi. Dalam menentukan sama ada ketiga-tiga penghina prospektif tersebut telah menghina mahkamah adalah penting untuk mempertimbangkan sama ada notis yang dikeluarkan kepada Yeong dikeluarkan oleh penghina-penghina tersebut dengan tujuan asal menyaman kerana fitnah atau hanya sebagai ugutan kosong untuk menakutkan Yeong dan memesongkan perjalanan keadilan.

Diputuskan, menolak usul dengan kos:

(1) Walaupun defendan pertama dan ketujuh dan peguam mereka, Siau, memilih untuk mengeluarkan surat tuntutan (notis) konsisten dengan pelaksanaan hak tindakan undang-undang dalam fitnah, hak ini tidak wujud dalam undang-undang memandangkan testimoni saksi, Yeong, dilindungi dalam undang-undang melainkan terdapat sumpah bohong. Walau bagaimanapun, kronologi peristiwa-peristiwa dan pengeluaran notis menunjukkan tujuan sebenar untuk menyaman kerana fitnah dan oleh itu notis tersebut tidak dikeluarkan hanya sebagai ugutan bagi tujuan menakutkan Yeong seperti yang didakwa (lihat perenggan 32).

(2) Isu mengenai notis kepada Yeong oleh Siau, bagi pihak defendan pertama dan ketujuh, lebih merupakan kesilapan dalam penghakiman dan pendapat undang-undang. Kesilapan penghakiman atau salah faham mengenai kedudukan undang-undang yang sebenarnya tidak terangkum dalam maksud jenayah menghina. Tidak terdapat mala fides pada masa material atau sebarang niat bersalah yang dijalankan untuk mengalahkan, menghalang atau mengganggu perlaksanaan keadilan (lihat perenggan 33).

(3) Memandangkan kesalahan menghina merupakan kesalahan kuasi-jenayah beban pembuktian ialah tanpa keraguan munasabah. Walau bagaimanapun, daripada fakta-fakta kes tiada bukti notis dikeluarkan dengan tujuan menakutkan Yeong atau mengganggu pelaksanaan keadilan dan 'absolutely necessary' untuk mengeluarkan perintah komital atas dasar menghina difailkan bagi menyokong usul ini (lihat perenggan 35–36).

(4) Aduan tersebut telahpun dibicarakan dan oleh itu tidak adil untuk mengenakan tindakan tambahan terhadap penghina-penghina tersebut. Lebih-lebih lagi perintah injunksi berdasarkan fakta-fakta yang sama dan terhadap orang yang sama telah diberikan dan aduan terhadap Siau kepada lembaga disiplin telahpun ditolak oleh lembaga dan Mahkamah Tinggi. Berdasarkan keadaan ini tindakan-tindakan tersebut, yang

berdasarkan fakta-fakta dan isu yang sama iaitu mengganggu pelaksanaan keadilan, tidak sepatutnya dibenarkan (lihat perenggan 37).]

Notes

For cases on application for order of committal, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue), paras 1822–1840.

Cases referred to

Attorney-General v Butterworth & Ors [1963] 1 QB 696, CA (refd)
Attorney General v Hislop & Anor [1991] 1 All ER 911, CA (refd)
Chandra Sri Ram v Murray Hiebert [1997] 3 MLJ 240, HC (refd)
Debabrata Bandopadhyay & Ors v The State of West Bengal AIR 1969 SC 189 (refd)
Jaginder Singh & Ors v Attorney-General [1983] 1 MLJ 71, FC (refd)
Joseph Orakwue Izuora v R [1953] AC 327, PC (refd)
Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd [2002] 4 MLJ 241; [2002] 4 AMR 4341, FC (refd)
Parashuram Detaram Shamdasani v King-Emperor [1945] AC 264, PC (refd)
R v Kellett [1975] 3 All ER 468, CA (refd)
Run Run Shaw Re and Runme Shaw; Ex parte Republic Pictures International Corporation [1949] Supp MLJ 16, HC (refd)
TO Thomas v Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151, FC (refd)
S Abdul Karim v MK Prakash & Ors (1976) SC 859 (refd)
Webster v Bakewell Rural District Council [1916] 1 Ch 300 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 13
Federal Constitution art 126
Rules of the High Court 1980 O 52 r 2(2)

SM Chan (Tan Chuan Yong & SM Chan) for the plaintiff.
YK Loo (YK Loo) for the first to seventh defendants.

Mary Lim JC:

[1] Enclosure 134 is a motion filed by the plaintiff pursuant to O 52 of the Rules of the High Court 1980 ('RHC 1980') following leave being granted on 25 January 2008. This motion seeks an order of committal against the first and seventh defendants and one Siau Suen Miin ('prospective contemnors') by reason of these persons having:

(a) committed contempt of court on or about 19 December 2005; or

(b) intentionally or effectively interfered with the administration of justice

by issuing a letter dated 19 December 2005 to one Yeong Sin Pui (Yeong) with the intention of intimidating this witness.

[2] As required by O 52 r 2(2) of the RHC 1980, a statement setting out the name and description of the applicant and the person sought to be committed as well as the grounds upon which the motion is sought together with an affidavit verifying the facts relied on were filed: encls 134B and 134A respectively. The first defendant filed an *Afidavit Jawapan* on behalf of herself and the seventh defendant (encl 137) while Siau Suen Miin ('Siau') filed another (encl 138). The plaintiff and Siau then filed several affidavits in response to each other's affidavits (encls 139, 140, 141, 142, 144 and 146). All the affidavits of the plaintiff were affirmed by its managing director, Tan Phuan Lam. In her submissions, learned counsel for the plaintiff/applicant took the position that this motion was necessary and of utmost importance to the protection of witnesses generally including Yeong. Otherwise the 'streams of justice' would be polluted by such conduct. It is imperative that the relevant background facts be viewed chronologically in order that this motion may be properly considered.

BACKGROUND FACTS

[3] On 31 May 2005 the plaintiff sued the 17 defendants some of whom were its ex-employees for loss and damage occasioned by reason of alleged fraud and/or breaches of trust, fiduciary duties and/or terms of contract. On 4 October 2005, the plaintiff applied for an ex parte mareva injunction against the first, second, 14th and 17th defendants. This application was then ordered to be heard inter partes. On 14 November 2005, Siau appeared together with another as counsel for the first, 14th and 17th defendants. The hearing was however adjourned to 27 February 2006.

[4] Meanwhile, the plaintiff filed another affidavit, affirmed by Yeong on 28 November 2005. In this affidavit Yeong, inter alia, deposed the contents of a telephone conversation between the first and seventh defendants that he purportedly overheard on the morning of 4 June 2003. A copy of the affidavit was served on the solicitors acting for all the defendants except the ninth defendant. Yeong's affidavit can be seen at exh 'TPL-2' in encl 134A. Paragraph 6 in his affidavit subsequently became the basis of much action and it states:

6. Pada pagi 4.6.2003 saya mendapat tahu daripada rakan-rakan sekerja saya bahawa terdapat kekecohan di dalam syarikat Plaintif di mana Encik Phillip Tan iaitu Pengarah Urusan baru Plaintif telah tidak dibenarkan memasuki pejabat Plaintif oleh Defendan Ke-3 dan Ke-4. Saya masih ingat apa yang berlaku pada hari tersebut. Pada hari tersebut

A lebih kurang pukul 10.30 pagi saya terdengar Defendan Ke-7 bercakap dengan Defendan Pertama melalui talipon. Pada masa itu saya berada di tepi Defendan Ke-7. Di dalam percakapan talipon tersebut, Defendan Ke-7 menanyakan Defendan Pertama mengenai 1,400 unit Intel Pentium CPU yang dia suruh untuk keluarkan dari stor Plaintif. Saya terdengar Defendan Pertama memberitahu Defendan Ke-7 di dalam bahasa Kantonis 'Jangan hirau. Ada dokumen pesanan keluarkan stok'. Selepas itu Defendan Ke-7 selesai bercakap dengan Defendan Pertama, Defendan Ke-7 komen pada saya dalam bahasa Kantonis 'Mudah sahaja bagi Miss Lam cakap. Saya yang keluarkan stok. Apa-apa yang berlaku saya yang tanggung beban'.

[5] On 19 December 2005, acting on the instructions of Liang Mon Loi and Lam Yen Ling (seventh and first defendants) Siau issued a notice to Yeong demanding an apology for alleged defamatory/libelous statement made in his affidavit against his clients (the said letter). In the said letter it was claimed that the allegations in the affidavit were *'in fact, malicious, bitter and unjustifiable attack upon our clients' reputation by irresponsibly imputing them to be thieves, criminals or ruthless, lawless, irresponsible, unethical, mischievous, or deceitful persons'*. The said letter further claimed that the *'facts are inaccurate and your statement is highly defamatory and has tarnished our clients' reputation'*. A complete withdrawal and apologies in the manner set out in the letter together with various other instructions and the sum of RM40,000 as damages were amongst the remedies sought. Legal action was then threatened in the event the reparation sought was not forthcoming. A copy of the said letter is exhibited as 'TPL-4' in encl 134A.

[6] By letter dated 27 December 2005 the plaintiff's solicitors wrote to the solicitors for the defendants informing them that their *'clients have, through Messrs. Siau Suen Miin & Tan, issued a notice date 19.12.2005 to Yeong Sin Pui in respect of Yeong Sin Pui's affidavit dated 28.11.2005 inter alia demanding him not to make the statements he made in his said affidavit'*. The letter then goes on to inform that that letter is viewed *'as an interference with and/or intimidation of witnesses in the proceedings'* as well as to notify that unless a written undertaking *'not to interfere with and/or intimidate witnesses in the proceedings including but not limited to those persons who have given sworn statements in the proceedings and/or any of our clients' ex-staff or current staff and/or our client's dealers, distributors, suppliers, customers, principals or otherwise'* an injunction would be sought to restrain the defendants. A copy of this letter is exhibited as 'TPL-5' in encl 134A.

[7] A separate letter dated 6 January 2006 was issued to Siau — exh TPL-6 in encl 134A. In this letter the essence of which was the same as exh 'TPL-5',

Siau was asked to withdraw the said letter failing which a police report and a complaint with the Bar Council would be lodged.

[8] On 9 January 2006 the plaintiff initiated an application to restrain all the defendants except the ninth defendant from taking any action which may have the effect of interfering with the administration of justice including intimidating or frightening potential witnesses (encl 87). The basis for the application was the notice dated 19 December 2005.

[9] From exh 'SSM-1' in encl 138 it appears that the plaintiff through one Phillip Tan had indeed lodged a written complaint with the disciplinary board on 13 January 2006 against Siau. In response to the board's letter, Siau by letter dated 23 February 2006 informed the board the reasons for sending the said letter of 19 December 2005. It appears that his reasons had already been set out in an affidavit filed in reply to an application by the plaintiff to disqualify Siau from representing the defendants. That application was dismissed by the court on 25 January 2006. His reasons were that Yeong's statement comprised hearsay evidence, and evidence that was scandalous, libelous and irrelevant in an application for a mareva injunction. Siau indicated his preparedness in retracting the letter if the court was of the view that the letter amounted to an intimidation or interference of a witness.

[10] On 17 May 2006, the disciplinary board dismissed the complaint on the basis of no merit. An appeal was lodged. On 2 June 2006, the application for a mareva injunction was dismissed. The plaintiff then lodged an appeal. On 5 July 2007 (encl 87) was allowed with modifications and the defendants were generally restrained from taking any action which may have the effect of interfering with the administration of justice including intimidating or frightening potential witnesses. The defendants appealed. On 20 January 2009, the appeal against the disciplinary board's decision was dismissed with costs. An appeal has since lodged at the Court of Appeal. On 27 April 2009, the Court of Appeal dismissed the appeal against the refusal for grant of a mareva injunction.

THE ISSUE

[11] The issue before me is whether the three prospective contemnors committed contempt of court. Such contempt is occasioned by the issue of the said letter with the intention of intimidating Yeong and thereby intentionally or effectively interfering with the administration of justice.

[12] From para 3.5 of the statement (encl 134A), the said letter written by Siau upon the instructions of the first and seventh defendants clearly lies at the heart of this motion for committal. This same letter was also the basis of

the restraining order granted on 5 July 2007. The committal order is sought against Siau because he was the solicitor who sent the letter and, against the first and seventh defendants, because they instructed Siau.

[13] At paras 3.6, 3.7 and 3.8, the plaintiff sets out the grounds upon which the assertion of interference with the administration of justice, perversion and obstruction of justice is made:

> 3.6 Notis Defendan tersebut bertujuan atau diniatkan atau mempunyai kesan untuk menakut-nakutkan atau mengintimidasikan atau mengganggu saksi iaitu Yeong Sin Pui yang telah memberi keterangan atas sumpah/ikrar di dalam kes ini melalui Afidavit Yeong Sin Pui tersebut supaya Yeong Sin Pui tersebut akan berasa takut untuk memberi apa-apa keterangan selanjutnya di dalam tindakan ini.
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> 3.7 Selanjutnya Notis Defendan tersebut bertujuan atau mempunyai kesan mengganggu pentadbiran keadilan Mahkamah Yang Mulia ini antara lainnya untuk menyekat atau cuba menyekat keterangan yang boleh dan patut diberikan di dalam perjalanan adil tindakan ini.
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> 3.8 Perbuatan Lam Yen Ling, Liang Mon Loi dan Siau Suen Miin di dalam mengeluarkan atau memberi arahan supaya dikeluarkan Notis Defendan tersebut terjumlah kepada penghinaan Mahkamah Yang Mulia ini.

[14] Further at paras 3.16 and 3.17, the plaintiff states that committal orders ought to be granted against the proposed contemnors because they issued or instructed to be issued the critical letter. It is the plaintiff's case that the letter and persons involved in its issuance have interfered with the administration of justice and/or perverted or obstructed the course of justice:

> 3.16 Bahawa Lam Yen Ling, Liang Mon Loi and Siau Suen Miin tersebut iaitu orang-orang yang diminta dikomitkan adalah orang-orang yang mengeluarkan atau atas arahannya dikeluarkan Notis Defendan tersebut.
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> 3.17 Bahawa Lam Yen Ling, Liang Mon Loi and Siau Suen Miin tersebut telah pada atau sekitar 19.12.2005 dalam mengeluarkan atau mengarahkan atau memberi arahan supaya dikeluarkan Notis Defendan tersebut kepada Yeong Sin Pui seorang yang telah atau bakal memberi keterangan di dalam tindakan ini atau prosiding di dalam tindakan ini atau prosiding di dalamnya dengan itu telah melakukan kesalahan menghina Mahkamah dan/atau mengganggu pentadbiran keadilan (interfered with the administration of justice) dan/atau memesong atau menghalang perjalanan keadilan (perverted or obstructed the course of justice)."

[15] The defendants' response to these serious charges as found in the affidavits filed can be summed up as follows:

(a) denial of the alleged acts or intention;

(b) delay on the part of the plaintiff in initiating this application;

(c) injunction already granted in respect of the same complaint and there has been due compliance of the injunction;

(d) failure of full and frank disclosure that:

(i) plaintiff had filed a complaint against Siau;

(ii) this complaint had been dismissed by the disciplinary board on the basis that the claim had no merit;

(iii) appeal against the disciplinary board's decision heard by the High Court on 17 January 2009;

(iv) appeal was pending against the decision granting injunction made on 5 July 2007; and

(e) multiplicity of proceedings and double jeopardy caused on Siau.

APPLICABLE LAW

[16] While art 126 of the Federal Constitution and s 13 of the Courts of Judicature Act 1964 (Act 91) provide the Federal Court, Court of Appeal and the High Court with the power to punish any contempt of itself, there is as yet no specific legislation on contempt in this country. Order 52 of the RHC 1980 serves as the procedural law on contempt. Most of the earlier decisions on contempt concerned instances of disobedience of court orders or contempt in the face of the court. Nevertheless it is obvious from these decisions that the common law principles on contempt apply.

[17] The purpose and justification for this jurisdiction is to enable the courts to deal with contempt and more importantly to punish where contempt is found. This has been succinctly stated by Lord Denning in *Attorney-General v Butterworth & Ors* [1963] 1 QB 696 at p 709:

> The origin, purpose and justification of the jurisdiction of the courts to punish contempt is the prevention of the interference with the administration of justice. Any act done which is calculated to lower the authority of the court is a contempt: see *Reg v Gray and Ambard v Attorney-General for Trinidad and Tobago*. Conduct which amounts to contempt may take a wide variety of forms, but once it is established that it does interfere with the administration of justice, there is jurisdiction to deal with it. The authority of the court is lowered by the acts which are calculated to deter witnesses from giving evidence before it. That is a statement of the obvious for which no authority should be required, but there is in fact

A authority for it in the dicta of Lord Langdale MR in *Littler v Thomson and Kay J in Rowden v Universities Co-operative Association Ltd*.

[18] In *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd* [2002] 4 MLJ 241 at p 248; [2002] 4 AMR 4341 at p 4351 the Federal Court quoted with approval the definition of 'contempt of court' by Nicholls LJ in *Attorney General v Hislop & Anor* [1991] 1 All ER 911 at p 923 as an 'interference with the due administration of justice'. However, because of the generality of the phrase 'administration of justice' itself the Federal Court was 'of the view that the categories of contempt are never closed'. Whether an act amounts to interference with or perverts the administration or course of justice must be determined on the facts and circumstances of each case. In its decision, the Federal Court also took the opportunity to endorse a similar view expressed by Low Hop Bing J (as His Lordship then was) in *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240. At p 270, His Lordship said:

> The circumstances and categories of facts which may arise and which may constitute contempt of court, in a particular case, are never closed. This is the same position as in the case of negligence in which the scope for development is limitless. Contempt of court may arise from any act or form whatsoever, ranging from libel or slander emanating from any contemptuous utterance, news item, report or article, to an act of disobedience to a court order or a failure to comply with a procedural requirement established by law. Any of these acts, in varying degrees, affects the administration of justice or may impede the fair trial of sub judice matters, civil or criminal, for the time being pending in any court.
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> The particular matrix of the individual case is of paramount importance in determining whether a particular circumstance attracts the application of the law of contempt. Hence, a positive perception of the facts is a prerequisite in deciding whether or not there is any contravention necessitating the invocation of the law of contempt.

[19] Further, as contempt proceedings are quasi-criminal in nature it is vital that the elements of contempt are satisfied on a standard of proof which is beyond reasonable doubt. In *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd* [2002] 4 MLJ 241 at p 253; [2002] 4 AMR 4341 at p 4359 the Federal Court stated:

> In the absence of a specific legislation on the contempt of court as stated earlier by us, the contempt of court in our country is guided by the common law principles. We agree with what was stated by Sir John Donaldson MR in *A-G v Newspapers Publishing Plc* (CA), that the standard of proof is the criminal standard be it classified as 'civil contempt' or 'criminal contempt' though such classification may tend to mislead rather than assist. Be that as it may, we are here concerned with the conduct involving an interference with the due administration of justice or the course of justice and not conduct involving the breach or assisting in the breach of

a court order. In this case the standard of proof required is proof beyond reasonable doubt. This standard of proof had been approved by our Supreme Court in *Houng Hai Hong & Anor v MBf Holdings Bhd & Anor* (and 3 Other Appeals) [1995] 3 AMR 3079.

[20] I, for my part, am reminded that in any contempt proceedings, the gravity and implications of the orders sought must not be forgotten. In *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151 the Federal Court remarked at p 153 in particular of contempt committed by counsel or solicitors:

> This is a matter which fortunately rarely arises in court. It concerns the question of an advocate accused of contempt of court by aiding and abetting a client to disobey a court order. I would like to refer to what Lord Goddard said when he delivered the judgment of the Judicial Committee of the Privy Council *Parashuram Detaram Shamdasani v King-Emperor* [1945] AC 264 at p 270 in respect of insulting statements made by a litigant or person with reference to the Bar and, in particular to counsel appearing against him. This is what Lord Goddard said:
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> > Their Lordships would once again emphasise what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of suppress methods of advocacy which are merely necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to offensive is to use it for a purpose for which it was never intended.

[21] This view was again echoed by the Federal Court in *Jaginder Singh & Ors v Attorney-General* [1983] 1 MLJ 71. After agreeing with the lower court's observations and expressions of caution and self-direction, the Federal Court reminded: 'As a finding of contempt of court is a conviction of an offence (see *Joseph Orakwue Izuora v R* [1953] AC 327, at p 334; *Parashuram Detaram Shamdasani v King-Emperor* [1945] AC 264 at p 270), the jurisdiction must be exercised sparingly, and where it is absolutely necessary'. These observations to me apply whether the prospective contemnor is counsel or lay person.

[22] It is not to say that there can never be contempt where counsel is involved or when a person is exercising his legal rights. What these guiding principles indicate is that the facts and surrounding circumstances must be carefully scrutinised. Therefore, the first order must be to carefully examine the said letter and the circumstances surrounding its issue. It is the plaintiff's case that the language and content of the said letter is intimidating and threatening of a witness. The fact that the said letter was issued by solicitors is seen as a relevant and aggravating factor. It is trite that the protection of witness is integral to the due and proper administration of justice in any

A country.

FINDINGS

B **[23]** Undoubtedly, the said letter is a letter of demand generally sent as a preliminary step in any intended defamation action. However, the alleged defamatory words are contained in an affidavit filed in court. This affidavit forms evidence before the court. Learned counsel for the plaintiff submitted that since such evidence is privileged and protected that letter of demand ought never to have been issued by Siau, an advocate and solicitor 'who could C not have known that the said defendants have no right to sue the witnesses for defamation on the witness's statement on account of privilege'. On that score, the said letter and more particularly its content becomes an intimidation or a threat to a witness if one of the purposes of the said letter was to persuade the witness to change or withhold his evidence or deter him D from giving it. The fact that the said letter was issued by or through an advocate and solicitor is submitted by the plaintiff to exacerbate the seriousness or gravity of the threat or intimidation. This is especially so where there is a real risk of interference with the due administration of justice. According to learned counsel, Siau ought not to have used his office as the E means to advance the threat in circumstances where the chances of persuading or influencing the witness one way or another are much higher than if the threat came from a layman.

F **[24]** Relying on *R v Kellett* [1975] 3 All ER 468 learned counsel for the plaintiff submitted that it does not matter that the proposed contemnor had no intention to interfere with the proper administration of justice. It is enough if the action complained of is inherently likely to so interfere. It also does not matter whether the witness is actually deterred or influenced. In *R v Kellett*, Stephenson LJ said at p 475:

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> Perversion of the course of justice is per se an offence against the public weal.' An attempt (or incitement) to pervert (or defeat) the (due) course of justice is an offence against the common law and no less than a conspiracy to pervert it was a punishable misdemeanor: *R v Grimes*, per Kilner Brown J; … Those cases show H also that tampering with evidence, inducing a person to give false evidence, or not to give evidence, for reward are instances of this common law offence whether the evidence is to be given in criminal or in civil proceedings and whether the inducement is effective or, as in this case, not.

I **[25]** Thus, what we have before us is a situation where parties are supposedly exercising their legal rights and in the course of it is alleged to have committed contempt. In *Kellett*, the Court of Appeal upheld the conviction of a contemnor though the threat was to exercise a legal right as that did not excuse the interference with the administration of justice. The

contemnor in that case had sent a letter to two neighbours who were potential witnesses for his wife in divorce proceedings informing them of his proposal to sue for slander. The contemnor did not get on with his wife or his neighbours. The letter was to afford these witnesses the opportunity to withdraw their evidence given in the form of statements to an enquiry agent. The intent of the letter was clearly to cause a change of evidence and thereby to interfere with the due administration of justice.

[26] Although Stephenson LJ decided that the exercise of a legal right may still amount to an interference with the administration of justice, at p 475 he nevertheless felt that 'It would seem repugnant to justice and to common sense if in every one of these cases the 'offender' could be said to be attempting to pervert or defeat the course or the ends of justice'. Each case must be determined on the facts and there is a need to prove intent or a guilty mind: see *Attorney-General v Butterworth & Ors* at p 722:

> I think the short answer to this contention is that contempt of court is a criminal offence, punishable summarily by the court itself, and like all criminal offences, it requires a guilty mind … At any rate, the law requires a guilty mind in these cases of intimidation or victimisation of witnesses … It seems to me that the intimidation of a witness is only a contempt of court if it is done with the purpose of deterring him from giving evidence or influencing him to give it in a sense different from that in which he would otherwise have given it, and the victimisation of a witness is only a contempt of court if it is done with the purpose of punishing him for having given evidence in the sense he did.

[27] In the facts of this case, the said letter demanded that Yeong fully and completely withdrew his statement not from the court files but by publication in a local English newspaper in terms to be approved by the defendants. There is no real difference here as the effect is the same — to require a withdrawal of a statement filed in court. This is a requirement under the law of defamation, that such a notice be first issued.

[28] In *Re Run Run Shaw and Runme Shaw; Ex parte Republic Pictures International Corporation* [1949] Supp MLJ 16 in the early days of anti-suit injunctions the Singapore court dismissed an application for contempt. The court held that there was nothing to bar the proposed contemnor from instituting the suit and making the application to the New York court for an injunction to restrain the applicants from proceeding with their action in Singapore for damages for breach of contract. The proposed contemnor was merely pursuing their legal rights. The court cited the decision in *Webster v Bakewell Rural District Council* [1916] 1 Ch 300 where a motion to commit a solicitor for contempt of court was dismissed on the basis that the solicitor was merely acting on instructions of the client, proposing or threatening to exercise a legal right.

[29] It is therefore critical to examine whether the said letter was issued by the proposed contemnors with no genuine intention of suing for defamation (see *R v Kellett* at p 472). In other words the threat was merely an empty threat with no other purpose but to intimidate Yeong and to pervert the course of justice. There must therefore be present a guilty mind. To determine this vital element, the reasons for making the demand must be scrutinised. This will involve scrutinising the affidavits filed.

[30] Although a great number of affidavits were filed in relation to the numerous interlocutory applications filed, only the ones pertaining to the mareva injunction (encl 42 where Yeong's affidavit is filed in support of), the injunction sought against the defendants (encl 87) and the application to remove Siau as counsel (encl 60) will be scrutinised. These applications have been referred to by the parties and it is appropriate to view them only in the context of understanding and confirming actions taken and the reasons for such actions.

[31] From these affidavits filed, the proposed contemnors, in particular Siau held the view that based on a Court of Appeal decision 'kata-kata Yeong Sin Pui tersebut adalah palsu dan boleh diambil tindakan undang-undang'. It was consistently maintained that the pertinent part of the statement contained hearsay evidence, was scandalous, libelous or irrelevant to the application for a mareva injunction. This can be found not only in the said letter but in various affidavits filed, namely affidavits filed in response to the current motion; to challenges launched by the plaintiff to remove Siau as counsel for the defendants; in the application for an injunction (encl 87); as well as in the written response to the disciplinary board. From the court file there is also a specific affidavit in reply affirmed on 21 December 2005 filed by the fourth and seventh defendants (encl 76) in response to the affidavit by Yeong. In that affidavit, apart from maintaining the position as just set out there were specific denials of the allegations made by Yeong.

[32] Now, it would appear that the appropriate method would be to apply to cross-examine Yeong on his affidavit with a view to discrediting him. However, the defendants and their counsel chose instead to issue a letter of demand consistent with the exercise of a legal right of action in defamation. But this right does not exist in law as the testimony of the witness is protected in law except where there is perjury. Although there are indications in the affidavit of the fourth and seventh defendants (encl 76) that a cross-examination of Yeong and another deponent of another affidavit may be undertaken, it is unclear why that did not materialise. Be that as it may the said letter and the consistent position taken by the proposed contemnors reflect the seriousness of the allegations of Yeong such that the first and seventh defendants sought legal advice on it. Legal opinion and

interpretation, though wrong were given by Siau and it was carried through with the issuance of the said letter. The chronology of events and the issue of the said letter reflect a genuine intention to sue for defamation. The said letter was not issued as a mere threat for the purpose of intimidating Yeong as alleged.

[33] I therefore do not find the existence of the necessary element of a guilty mind as decided in *Attorney-General v Butterworth & Ors* and *TO Thomas*. What I do find is human frailty. As humans and more as legal counsel and thereby as an officer of the court, there is bound to be the occasion when there is error in judgment and legal opinion. This is one such occasion where Siau erred in his legal apprehension and in so doing departed erroneous legal advice leading to the issue of the letter of demand. I do not find any mala fides at the material time or any guilty mind operating to defeat, obstruct or interfere with the administration of justice. At pp 154–155, the Federal Court in *TO Thomas* pointed the significance of this element:

> Another point raised is that in a contempt case it must be proved that appellant had a guilty mind — in the sense that he deliberately aided and abetted another to disobey a court order. … In *Debabrata Bandopadhyay & Ors v The State of West Bengal* AIR 1969 SC 189, Hidayatullah CJ at p 193 observed that:
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> > A question whether there is contempt of court or not is a serious one. The court is both the accuser as well as the judge of the accusation. It behoves the court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemnor must be punished. It must be realised that our system of courts often results in delay of one kind or another. The remedy for it is reform and punishment departmentally. Punishment under the law of contempt is called for when the lapse is deliberate and in disregard of one's duty and in defiance of authority. To take action in an unclear case is to make the law of contempt do duty for other measures and is not to be encouraged.

[34] It cannot be gainsaid that because of the nature of the proceedings, strict proof is required. Errors of judgment or misapprehension of the correct legal position do not fall within the meaning of criminal contempt as was expressed by Sarkaria J in *S Abdul Karim v MK Prakash & Ors* (1976) SC 859 and cited by the Federal Court at p 155:

> Sarkaria J expressed his opinion in *S Abdul Karim v MK Prakash & Ors* (1976) SC 859 in these words at p 863:
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> > The broad test to be applied in such cases is, where the act complained of was calculated to obstruct or had an intrinsic tendency to interfere with the course of justice and the due administration of law. The standard of proof required to

establish a charge of 'criminal contempt' is the same as in any other criminal proceedings. It is all the more necessary to insist upon strict proof of such charge when the act or omission complained of is committed by the respondent under the colour of his office as a judicial officer. Wrong order or even an act of usurpation of jurisdiction committed by a judicial officer, owing to an error of judgment or to misapprehension of the correct legal position, does not fall within the mischief of 'criminal contempt'. Human judgment is fallible and a judicial officer is no exception. Consequently, so long as a judicial officer in the discharge of his official duties, acts in good faith and without any motive to defeat, obstruct or interfere with the due course of justice, the courts will not, as a rule, punish him for a 'criminal contempt'. Even if it could be argued that mens rea, as such, us not an indispensible ingredient of the offence of contempt, the courts are loath to punish a contemnor, if the act or omission complained of, was not willful.

[35] Further, this being a quasi-criminal offence where the burden of proof is beyond reasonable doubt, I would have expected some evidence forthcoming from Yeong. After all, the said letter was issued to him. Though the 'threat' need not be shown to have operated on him, but bearing in mind the far-reaching implications of this motion, there must, at the very least, be some evidence of a complaint by him. It cannot be presumed. There is none.

[36] From the facts of this case I do not find it 'absolutely necessary' nor do I find evidence beyond reasonable doubt that the said letter and the persons involved in its issue are guilty of contumacious conduct warranting an order of committal for contempt on the grounds and for reasons set out in the statement and affidavit filed in support of this motion. The said letter was not issued with the intention of intimidating Yeong or interfering with the administration of justice or perverting the course of justice.

[37] In the event that the above finding is wrong, I am nevertheless of the view that this motion ought not to be granted for other reasons. Firstly, the complaint has already been dealt with and it would not be just to subject the proposed contemnors to this additional action. As threatened by the plaintiff's solicitors when there was no retraction from the defendants and from Siau a complaint was lodged with the disciplinary board and an application for an injunction filed. Those complaints have been dealt with — by this court when on 5 July 2007 an order of injunction based on the same facts and against the same persons was granted. There are no complaints of non-compliance of that order. Although there is a pending appeal there is no stay of the effect of the injunction. The disciplinary board too has deliberated and determined the complaint lodged by the plaintiff. The board dismissed the complaint after finding no merit in the complaint. The appeal against this determination has also been dismissed by the High Court. Obviously there is

multiplicity of action that must not be allowed. These actions are based not just on the same facts but in respect of the same issue — interference with the administration of justice.

[38] Finally, there has been delay in moving this court for this motion. Whilst it is noble on the part of learned counsel to take up the present cause in the interest of preventing future instances of witnesses 'being deterred from coming forward in the aid of legal proceedings' making it therefore impossible to administer justice, such causes must be done promptly. Otherwise interference, if it is interference in the first place is permitted to take its insidious effect. However, as explained, what we have here is an example of man, including lawyers being fallible and making errors of judgment with no malice or such similar intent. In such a case the greatest latitude must be shown having regard to the implications of the order sought.

[39] In the circumstances the motion (encl 134) is dismissed with costs.

Motion dismissed with costs.

Reported by K Nesan